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No. 97 - 2048

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

WILLIAM D. O'SULLIVAN,

v.

Petitioner,

DARREN BOERCKEL,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit**

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

May an individual who is in custody pursuant to a state criminal conviction pursue claims in a federal *habeas* petition if those claims were not raised on direct appeal in a petition for discretionary review to the state's highest court?

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The October 28, 1996 unpublished order of the United States District Court for the Central District Of Illinois, Springfield Division, is reprinted in the joint appendix at 4. The February 9, 1998, decision of the United States Court of Appeals for the Seventh Circuit is published at 135 F.3d 1194 (7th Cir. 1998), and is reprinted in the joint appendix at 23. The March 20, 1998 order of the Court of Appeals, denying O'Sullivan's Petition for Rehearing with Suggestions for Rehearing *En Banc*, is published at 1998 U.S. App. LEXIS 6150 (7th Cir. March 20, 1998), and reprinted in the joint appendix at 39.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on February 9, 1998, and rehearing was denied on March 20, 1998. O'Sullivan filed the Petition for Writ of *Certiorari* on June 17, 1998. On November 16, 1998, this Court granted the Petition limited to the question presented. O'Sullivan invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) and § 2101(c).

STATUTE INVOLVED

The case puts in issue 28 U.S.C. § 2254(c), which provides:

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

The United States District Court for the Central District of Illinois, Springfield Division, asserted jurisdiction under 28 U.S.C. § 2254. The United States Court of Appeals for the Seventh Circuit's jurisdiction was founded upon 28 U.S.C. §§ 1291 and 2253.

Boerckel had appealed from a final judgment of the district court denying his petition for writ of *habeas corpus* brought pursuant to 28 U.S.C. § 2254. Boerckel had previously been convicted of rape, burglary, and aggravated battery pursuant to a 1977 state court judgment following a jury trial. Boerckel was sentenced to concurrent terms of imprisonment of 20 to 60, 5 to 15, and 2 to 6 years, respectively. His convictions and sentences were affirmed on direct appeal to the Illinois Appellate Court, Fifth District, on January 10, 1979. See *People v. Boerckel*, 68 Ill. App. 3d 103, 385 N.E.2d 815 (5th Dist. 1979). And on May 31, 1979, the Illinois Supreme Court denied his petition for leave to appeal. Boerckel filed a petition for writ of *certiorari* which was also denied. See *Boerckel v. Illinois*, 447 U.S. 911 (1980).

On September 26, 1994, Boerckel filed a *pro se* petition for *habeas corpus* relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Central District of Illinois. The court subsequently appointed counsel and an amended petition was filed on March 15, 1995. The amended petition raised the following six issues: (1) whether Boerckel knowingly and intelligently waived his *Miranda* rights; (2) whether his confession was involuntary; (3) whether the evidence against him was insufficient to support a guilty verdict; (4) whether

his confession was the fruit of an illegal arrest; (5) whether he received the ineffective assistance of both trial and appellate counsel; and (6) whether the prosecution violated his right of discovery under *Brady v. Maryland*, 373 U.S. 83 (1963).

The district court entered an order on November 15, 1995 dismissing the fourth ground of the petition on the merits as barred by *Stone v. Powell*, 428 U.S. 465 (1976). The court also held that Boerckel procedurally defaulted on the fifth ground, since it was never raised on direct appeal to any state court, but that the sixth ground was properly presented and should be addressed on the merits. Finally, the court determined that Boerckel had procedurally defaulted on the first, second, and third grounds under *Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985), because these grounds were not included in the petition for leave to appeal to the Illinois Supreme Court. These grounds were deemed procedurally barred because the time period in which Boerckel could have raised them to the Illinois Supreme Court had passed.

After these initial rulings, the district court requested additional briefing. Specifically, the court asked Boerckel to address the issue of cause for, or prejudice from, his procedural defaults on the first, second, third, and fifth grounds. The court also directed the State to respond to the merits of Boerckel's petition, which it had not done in its initial response. Boerckel did not articulate any cause for his procedural defaults. Instead, he argued that the court could hear his claims under the actual innocence or fundamental miscarriage of justice exception to the rule of procedural default.

On July 24, 1996, the court set the matter for hearing. At the hearing, Boerckel presented witnesses who testified that, in the years since his conviction, two men had made statements that they committed the rape for which Boerckel was convicted.

On October 28, 1996, the district court found that the recent amendments to 28 U.S.C. § 2254 prohibited an evidentiary hearing¹ and that the court must ignore the evidence presented at the hearing. The court added, however, that even if it believed the witnesses, their testimony would establish only that others were present at the time the crimes were committed, but not that Boerckel was not present. The district court further found that Boerckel had procedurally defaulted on his first, second, third, and fifth grounds for *habeas corpus* relief and that he failed to show cause for the default.

The district court denied the amended petition on October 28, 1996. JA 4. Boerckel filed a notice of appeal on November 27, 1996. The district court subsequently denied a certificate of appealability. However, the United States Court of Appeals for the Seventh Circuit granted a certificate of appealability on April 2, 1997. Then, on February 9, 1998, a panel of the United States Court of Appeals for the Seventh Circuit reversed the district court's dismissal of Boerckel's *habeas corpus*

¹ When the district court made this determination, it relied on the Court of Appeals' interpretation of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (holding that courts may apply the statute retroactively). This Court has subsequently reversed the Court of Appeals' interpretation of this issue. See *Lindh v. Murphy*, 521 U.S. 320 (1997).

petition and remanded for further proceedings. JA 23. Specifically, the court found that the exhaustion principle of 28 U.S.C. § 2254 does not require that a *habeas corpus* petitioner include all of his claims in a petition for leave to appeal to the Illinois Supreme Court. JA 38, *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1202 (7th Cir. 1998). Based on this holding, the panel found it unnecessary to reach the question of whether the Illinois Supreme Court would find these claims procedurally barred because of its timing requirement. *Id.*

On March 9, 1998, O'Sullivan filed a petition for rehearing with suggestion for rehearing *en banc*. The petition was denied in an order dated March 20, 1998. JA 39. No judge in active service requested a vote thereon, and all of the judges on the original panel voted to deny rehearing. *Id.* The United States Court of Appeals for the Seventh Circuit issued its mandate on March 30, 1998.

On April 2, 1998, the district court issued an order indicating that three of the issues² which it had previously determined had been procedurally defaulted would need to be rebriefed. Accordingly, the district court ordered Boerckel to submit briefing on his asserted grounds for relief and O'Sullivan was directed to file a brief in response.

² The three issues were as follows: (1) that he did not knowingly and intelligently waive his *Miranda* rights; (2) that his confession was involuntary; and (3) that the evidence against him was insufficient to support a jury verdict.

On June 17, 1998, O'Sullivan filed a petition for a writ of *certiorari* with this Court to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. On November 16, 1998, this Court granted the petition for writ of *certiorari*. On November 17, 1998, after two unsuccessful attempts to stay the proceedings before the district court, O'Sullivan filed an emergency motion for stay of the district court proceedings with this Court. And on November 20, 1998, this Court granted O'Sullivan's emergency motion to stay the proceedings before the district court, pending the resolution of the case in this Court.

SUMMARY OF ARGUMENT

This Court has consistently recognized the importance of federal-state comity in the context of *habeas corpus* proceedings. *Ex parte Royall*, 117 U.S. 241, 251 (1886); *Darr v. Burford*, 339 U.S. 200, 204 (1950); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*). In recent opinions, the Court has employed these doctrines as a rationale for balancing the judicial sovereignty of the states in the administration of criminal law against the interest of individuals who claim their state court convictions should be reviewed for federal constitutional violations. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992); *Engle v. Isaac*, 456 U.S. 107, 128 (1982). The Court's acknowledgment of these doctrines has included consideration of the fact that federal encroachment into state criminal trials frustrates both the states' ability to punish and their opportunity to understand and even-handedly apply federal constitutional principles. *Rose v. Lundy*, 455 U.S. 507, 518 (1982). O'Sullivan

posits that requiring state prisoners first to pursue federal constitutional claims to the state's highest court prior to seeking *habeas* review fosters notions of federalism and comity while preserving the writ's fundamental purpose of curing constitutional error. *See generally Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

The Court of Appeals' holding below conflicts with these important principles. Had the lower court adopted the approach urged by O'Sullivan, questioning first whether Boerckel had exhausted his state court remedies, before determining whether he had procedurally defaulted the three claims which he failed to raise on discretionary appeal to the state's highest court, its decision would have comported with the notions of federalism and comity as well as with this Court's jurisprudence. The fact that Boerckel failed to exhaust his state court remedies with respect to these three claims, when combined with the fact that the time-frame within which he might otherwise have exhausted those remedies had passed, should have led the Court of Appeals to conclude that he had procedurally defaulted.

Instead, the approach embraced below is akin to *Fay v. Noia*'s, 372 U.S. 391 (1963), deliberate bypass standard, which this Court renounced in *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977), since the former rule failed to accord the state rule the respect it deserved. Moreover, the decision of the court below was premised upon an unduly limited reading of 28 U.S.C. § 2254(c) and a misunderstanding of this Court's jurisprudence.

An individual need not be required to take redundant steps, such as petitioning for state collateral relief, prior to seeking federal *habeas* review. *See Brown v.*

Allen, 344 U.S. 443, 447, 448-49 n.3 (1953) (holding that the exhaustion doctrine does not require *habeas* petitioners to seek state collateral relief based upon the same evidence and issues once the state courts have already ruled on the claim on direct review) and *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971). Urging a state prisoner to undertake a second line of attack upon his conviction would not promote comity. In fact, Illinois law would preclude such action. However, requiring him to complete a single layer of direct review by petitioning the state's highest court for relief certainly does. Moreover, such a requirement insures that the state's highest court maintains its influence over lower courts by allowing it to review and correct their federal constitutional errors.

This Court has candidly acknowledged its "historic willingness" to modify its earlier opinions on the scope of the writ of *habeas corpus*. *Wainwright*, 433 U.S. at 77-81. O'Sullivan is merely appealing to this Court to resolve a question, consistent with its jurisprudence concerning federal-state comity, which, until now, has been left unanswered. In response to the question presented here, this Court should hold that an individual who is in custody pursuant to a state criminal conviction may not pursue claims in a federal *habeas* petition if those claims were not raised on direct appeal in a petition for discretionary review to the state's highest court.

ARGUMENT

THE EVOLUTION OF THE REMEDY OF *HABEAS CORPUS*, IN GENERAL, AND THE DOCTRINE OF EXHAUSTION, IN PARTICULAR, JUSTIFY THE ENFORCEMENT OF A RULE REQUIRING PETITIONERS TO RAISE THEIR CLAIMS TO THE HIGHEST COURT OF THE STATE ON DIRECT APPEAL IN ORDER TO PRESERVE THOSE CLAIMS FOR FEDERAL COLLATERAL REVIEW.

Federal *habeas corpus* for state prisoners has been particularly controversial because "federal intrusions into state criminal trials frustrates both the State's sovereign power to punish and their good-faith attempts to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). The doctrines of federalism and comity work generally to alleviate this controversy. Federalism provides for a system of government in which power is divided between at least two levels of sovereignty, a central government and multiple local governments, by a constitution consisting of both exclusive and concurrent powers. See generally Daniel A. Farber et al., *Constitutional Law* 773-74 (1993). And comity advises the courts of one jurisdiction to give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. See *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

The doctrine of exhaustion of state court remedies, which is premised upon the notion of federal and state court comity, requires federal *habeas corpus* petitioners to adequately present their claims to the state courts before seeking relief from the federal courts. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) (exhaustion rule is grounded in "[c]omity concerns"; "[t]he pur-

pose of exhaustion is . . . [to] afford the State a full and fair opportunity to address and resolve the [federal] claim on the merits"). "The exhaustion doctrine is principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose*, 455 U.S. at 518 (citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-491 (1973)); see also *Developments, Federal Habeas Corpus*, 83 HAR. L. REV. 1038, 1094 (1970) (cited favorably in *Braden*).

While the original meaning and application of the exhaustion doctrine is a matter of considerable controversy,³ this Court has stated that "[t]he purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court." *Tamayo-Reyes*, 504 U.S. at 10.

A. The Court of Appeals' Holding Conflicts With Principles of Federalism And Comity.

This Court invoked the doctrines of federalism and comity in the exhaustion context in *Rose v. Lundy*, 455

³ See James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* Vol. 2 § 23.1 n.5 (2nd ed.); *Withrow v. Williams*, 507 U.S. 680, 720 (1993) (Scalia, J. concurring in part and dissenting in part); Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin & David L. Shapiro, Hart and Wechsler's *The Federal Courts and the Federal System* 1502 (3d ed. 1988 & Supp. 1992); *Withrow v. Williams*, 507 U.S. 680, 698 (O'Connor, J., concurring in part and dissenting in part) (citing *Ex parte Royall*, 117 U.S. 241, 251-53 (1886)).

U.S. 509 (1982). In *Rose*, this Court adopted a *per se* rule requiring federal district courts to dismiss every habeas corpus petition filed by a state prisoner under 28 U.S.C. § 2254 presenting unexhausted claims. *Id.* at 522. Under this "total exhaustion" rule, the petitioner could elect to return to state court to exhaust all claims, or to delete the unexhausted claims and proceed with those that have been exhausted in the state courts. *Id.* at 520-521.

In developing its policy arguments, the *Rose* Court relied upon a number of cases, illustrating that it had long recognized the importance of the exhaustion doctrine. The Court noted that in *Ex parte Royall*, 117 U.S. 241, 251 (1886), it held that although federal courts have the power to discharge a state prisoner restrained in violation of the Constitution, to facilitate accord between courts "equally bound to guard and protect rights secured by the Constitution," the federal court should abstain from proceeding on habeas corpus until the state court proceedings are completed. See *Rose*, 455 U.S. at 518. Next, citing *Darr v. Burford*, 339 U.S. 200, 204 (1950), the Court reiterated how "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Rose*, 455 U.S. at 518. Finally, the Court cited *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*) where it had commented that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Rose*, 455 U.S. at 518.

The majority closed its opinion by stating:

In sum, because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss *habeas* petitions containing both unexhausted and exhausted claims.

Id. at 522. Thus, the Court's conclusion in *Rose* underscored its determination to restrain the overly broad allowance of federal *habeas* review for state prisoners in order to promote the interests of comity and federalism.

With the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter, "AEDPA"), Congress has, admittedly, legislatively superseded the holding in *Rose* by providing as follows:

An application for a writ of *habeas corpus* may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(b)(2).

By means of this provision, federal courts may reach the merits of unexhausted claims, but only to deny *habeas corpus* relief. However, this amendment is consistent with the concepts of comity, federalism, and finality since it enables federal courts to endorse state court convictions without usurping the state courts' ability to correct their own errors of federal constitutional law. A federal district court may now advance the finality of a state court conviction by denying relief on unexhausted *habeas* claims. Nevertheless, the court still may not grant relief on such claims, but rather must dismiss a petition which contains potentially mer-

itorious, unexhausted claims. This permits the state courts to have the first opportunity to correct the error, in accordance with the doctrines of comity and federalism. Congress' enactment of this particular provision of the AEDPA is therefore mindful of federal-state comity. Furthermore, it corrects a concern which Justice Blackmun found to be inherently problematic in the *Rose* Court's plurality decision. In his concurrence, Justice Blackmun stated:

In some respects, the Court's ruling appears more destructive than solicitous of federal-state comity. Remitting a *habeas* petitioner to state court to exhaust a patently frivolous claim before the federal court may consider a serious, exhausted ground for relief hardly demonstrates respect for the state courts. The state judiciary's time and resources are then spent rejecting the obviously meritless unexhausted claim, which doubtless will receive little or no attention in the subsequent federal proceeding that focuses on the substantial exhausted claim. I can 'conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles.'

Rose, 455 at 525 (Blackmun, J., concurring) (quoting *Roberts v. LaVallee*, 389 U.S. 40, 43 (1967)).

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court recognized the subtle interplay between the concepts of exhaustion and procedural default. The *Coleman* Court reaffirmed the necessity of giving state courts the first opportunity to address allegations of constitutional error concerning state court convictions.

There, the Court discussed that, in the *habeas* context, application of the independent and adequate state law doctrine is grounded in concerns of comity and federalism. *Coleman*, 501 U.S. at 730. Moreover, the Court noted that when the independent and adequate state ground supporting a *habeas* petitioner's custody is a state procedural default, an additional concern comes into play, the exhaustion requirement. *Id.* at 731. Since exhaustion is also grounded in concerns of comity, this means that in a federal system, the states should have the first opportunity to address and correct alleged violations of state prisoners' federal rights. *Id.* (citing *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). The Court concluded that the same concerns apply to both exhaustion and procedural default. *Coleman*, 501 U.S. 731. It reasoned:

Just as in those cases in which a state prisoner fails to exhaust state remedies, a *habeas* petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A *habeas* petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him. See 28 U.S.C. § 2254(b); *Engle v. Isaac*, 456 U.S. 107, 125-126, n. 28, 102 S.Ct. 1558, 1570, n. 28, 71 L.Ed.2d 783 (1982). In the absence of the independent and adequate state ground doctrine in federal *habeas*, *habeas* petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state

ground doctrine ensures that the States' interests in correcting their own mistakes is respected in all federal *habeas* cases.

Id. at 732.

Much of the *Coleman* Court's discussion focused on the difficulty of crediting state court decisions since it is often unclear if the state law analysis was independent of federal law. The Court concluded that in ambiguous cases, federal courts may address the merits of the *habeas* petition if the decision of the last state court to which the petitioner presented his claims fairly appears to have rested primarily on federal law in resolution of those claims, or to have been interwoven with federal law, and does not clearly and expressly rely on an independent and adequate state ground. *Coleman*, 501 U.S. at 735. However, the Court stated that this rule does not apply in cases where the petitioner failed to exhaust state court remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. *Id.* at 735 n.1. "In such a case there is a procedural default for purposes of federal *habeas* regardless of the decision of the last state court to which the petitioner actually presented his claims." *Id.* (citing *Harris v. Reed*, 489 U.S. 255, 269-270 (1989) (O'Connor, J., concurring); *Teague v. Lane*, 489 U.S. 288, 297-298 (1989)).

The exception to the rule announced in *Coleman* is precisely the situation in the instant case. Here, Boerckel failed to raise three claims to the Illinois Supreme Court which he subsequently raised in his federal *habeas corpus* petition. The time for filing the claims

had long since passed when he filed his federal *habeas* petition. See Illinois Supreme Court Rule 315(b). Thus, Boerckel's failure to exhaust state court remedies when he failed to include the three claims in his petition for leave to appeal to the Illinois Supreme Court should have precluded the Court of Appeals from remanding these three claims to the district court for a determination on the merits, since they had been procedurally defaulted.

The Court of Appeals' opinion here correctly notes that the key to evaluating this question requires a preliminary inquiry into whether Boerckel exhausted his state court remedies before any determination can be made as to procedural default. JA 33, *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1199 (7th Cir. 1998). It is precisely Boerckel's failure to exhaust, coupled with the fact that he no longer can exhaust, which ripens into a procedural default. See *Coleman*, 501 U.S. at 735 n.1.

The Court of Appeals attempted to "solve[] the puzzle of how many chances a petitioner must give the state courts to review his claims" by turning to the language of 28 U.S.C. § 2254(c). JA 33, *Boerckel*, 135 F.3d at 1199. However, in concluding that an applicant has exhausted the remedies available if he takes advantage of whatever appeals the state system affords as of right (*id.* at 12), the Court of Appeals has read a limitation into the statute which is contrary to principles of federalism and comity.

The relevant language of the *habeas corpus* statute provides:

An applicant shall not be deemed to have exhausted the remedies available in the courts of

the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(c). This statutory formulation originally was enacted in 1948, incorporating the principles of the Court's decision in *Ex parte Hawk*, 321 U.S. 114 (1944).

On several occasions this Court has addressed the breadth of the provision's language "by any available procedure." On the one hand are cases such as *Brown v. Allen*, 344 U.S. 443, 447 (1953), and *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971), where this Court held that it would not interpret the language so literally as to require that a *habeas* petitioner take redundant steps in the state courts before filing federal *habeas* petitions. See also, *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991). On the other hand, in *Castille v. Peoples*, 489 U.S. 346 (1989), this Court rejected a *habeas* petitioner's assertion that he had fairly presented a claim by raising it for the first time on discretionary review to a State's highest court, noting as follows:

Although we have rejected a narrow interpretation of § 2254(c), we have not blue-penciled the provision from the text of the statute.

489 U.S. at 351. The case at bar presents a middle ground, since Boerckel did present the three contested claims to the intermediate appellate court, but failed to include them among those raised in his petition for leave to appeal to the Illinois Supreme Court, where a potential opportunity for relief existed.

O'Sullivan maintains that a requirement that a *habeas* petitioner raise his claims on discretionary re-

view to the state supreme court before filing a federal *habeas* petition is desirable, fosters notions of federalism and comity, and is consistent with other jurisprudence of this Court. O'Sullivan is not arguing that Boerckel should have been required to take a redundant action, such as those eschewed by this Court in *Brown and Wilwording*. Indeed, Illinois' Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.*, would preclude such a position, since post-conviction petitioners in Illinois may raise only state or federal constitutional claims which were not and could not have been raised on direct appeal. *People v. Neal*, 142 Ill.2d 140, 146 (1990), *cert. denied*, *Neal v. Illinois*, 502 U.S. 943 (1991).

A petition for leave to appeal, under Illinois Supreme Court Rule 315, and undoubtedly under like rules of many other states, is another layer of review on direct appeal in the state court system during which it is entirely possible that the litigant's federal constitutional rights may be vindicated. Requiring use of this remedy as a precursor to filing federal *habeas corpus* petitions is desirable, since it may obviate the need for some cases or issues to even come to federal court, and will allow the lower state courts to be guided in their understanding of federal constitutional principles by the highest state courts. These considerations are the essence of comity and federalism. *Tamayo-Reyes*, 504 U.S. at 10. Any contrary holding which excuses the presentation of issues ultimately brought on federal *habeas corpus* appears inconsistent with the cause and prejudice standard enunciated in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and more closely resembles a return to the deliberate bypass standard of *Fay v. Noia*, 372

U.S. 391 (1963). Additionally, a contrary holding will leave state prisoners with little incentive to petition the state supreme courts.⁴ This, in turn, will denigrate the importance of those courts, by depriving them of the opportunity to correct federal constitutional errors and to guide their own lower courts with respect to these important principles. See Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 MINN. L. REV. 1197, 1225-26 (1995) (authored by Matthew L. Anderson).

Some federal courts which hold that *habeas* petitioners need not seek discretionary review in the states' highest courts base such holdings on the unlikelihood of a petitioner obtaining review on the merits of his claims. See, e.g., *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984). In fact, the Court of Appeals' interpretation seems to have been borne out of its reliance upon just such a case. See JA 34, *Boerckel*, 135 F.3d at 1200 (citing *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994)). Boerckel would appear hard-pressed to promote such a theory. He obviously recognized leave to appeal as a desirable vehicle of review, since he actually filed a petition for leave to appeal to the Illinois Supreme

⁴ Of course, prisoners believing the state supreme court is more likely to provide relief than federal courts have an incentive to petition for discretionary review. Conventional wisdom, however, is that federal courts are more receptive to federal constitutional issues and exercise more independent judgment. See Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1022-24 (1985) (distinguishing the interests of federal and state judges).

Court, albeit one not raising the claims in question.⁵ Even were it otherwise, the notion that a discretionary court is not an "available procedure" in which to advance an issue is simply untrue. Assuming that only a small percentage of cases are accepted for discretionary review,⁶ the fact remains that cases are accepted on discretionary review by the states' highest courts, and that some federal *habeas corpus* cases undoubtedly will be obviated by the acceptance of some of those cases. See Note, *Requiring Unwanted Habeas*, *supra*, at 1225.

The assertion that the unlikelihood of obtaining review on the merits justifies discounting state discretionary review as "any available procedure" would argue equally in favor of liberally construing "the highest state court in which a decision could be had" language which governs this Court's jurisdiction. 28 U.S.C. § 1257(a). Yet, this Court jealously guards its jurisdiction, and for precisely the same reasons that the exhaustion doctrine exists in federal *habeas corpus*. In *Costarelli v. Massachusetts*, 421 U.S. 193 (1975) (*per curiam*), in which this Court dismissed the appeal of a Massachusetts litigant who had not taken advantage of that state's second tier of a "two-tier" system for trial of certain criminal charges, this Court stated:

It is thus clear that Costarelli can raise his constitutional issues in Superior Court by a motion

⁵ Boerckel also went further, seeking the extraordinary remedy of a writ of *certiorari* from this Court. See *Boerckel v. Illinois*, 447 U.S. 911 (1980).

⁶ Of course, the availability of review in state supreme courts may fluctuate due to changes in court rules, statutes, and even state constitutions.

to dismiss, and can obtain state appellate review of an adverse decision through the state high court. That the issue might be mooted by his acquittal in Superior Court is, of course, without consequence, since an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may be otherwise resolved. (Citations omitted).

421 U.S. at 196. The exhaustion requirement in *habeas* practice is rooted in that precise concern for federalism and comity.

A requirement that a future *habeas* petitioner take his claims to a state's discretionary supreme court is not particularly burdensome. In Illinois, for example, a litigant has between 21 and 35 days after the intermediate reviewing court's decision in which to file a petition for leave to appeal. Illinois Supreme Court Rule 315(b). Since the Illinois Supreme Court convenes five terms a year (705 ILCS 10/12), petitions for leave to appeal do not remain pending for an inordinate amount of time. Thus, if a petition is deemed unworthy of a grant of review, the petitioner will be in a position to seek federal *habeas* relief relatively quickly. On the other hand, if a petition is allowed, there remains a distinct possibility that the criminal appellant will gain relief from his conviction in the state courts.

In the proceedings below, the Court of Appeals held that the exhaustion principle of 28 U.S.C. § 2254 does not require a *habeas corpus* petitioner to include all of his claims in a petition for leave to appeal to the Illinois Supreme Court. JA 38, *Boerckel v. O'Sullivan*, 135

F.3d 1194, 1202 (7th Cir. 1998). It then reversed the district court's dismissal of Boerckel's *habeas* petition and remanded for further proceedings. *Id.* In reaching this conclusion, the Court of Appeals noted, and partially relied upon, its own decision in *Hogan v. McBride*, 74 F.3d 144 (7th Cir.), *modified on reh'g denied*, 79 F.3d 578 (7th Cir. 1996). JA 30-31, 38, *Boerckel*, 135 F.3d at 1198-1199, 1202. In *Hogan*, the Court of Appeals suggested that this Court's decisions in *Harris v. Reed*, 489 U.S. 255 (1989), *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), and *Coleman v. Thompson*, 501 U.S. 722 (1991), had invalidated prior caselaw in which the Court of Appeals required a *habeas* petitioner to seek review in the state's highest court on pain of forfeiture, specifically, *Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985). *Hogan*, 74 F.3d at 146.

Reliance upon *Harris* to support that position was flawed. In *Harris*, this Court addressed whether an ambiguous statement by the Illinois Appellate Court on post-conviction review constituted an independent and adequate state ground sufficient to bar consideration of the merits of the claim in a federal *habeas* proceeding. In its factual recitation, the Court noted that Harris "did not seek review in the Supreme Court of Illinois." 489 U.S. at 258. Then, the Court adopted the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), as the test for determining in a federal *habeas corpus* proceeding whether the state court's holding rested on an independent and adequate state ground. Finding no such plain statement in the Illinois Appellate Court's decision, the Court remanded the case for further proceedings, presumably a review of the merits.

Apparently, the *Hogan* court inferred that, since Harris did not seek leave to appeal, yet his claim survived procedural default, this Court would not require an Illinois petitioner to seek discretionary appeal to the state supreme court for exhaustion purposes. Yet, there is no indication in that decision that the government raised the claim that Harris' failure to have sought discretionary review constituted a failure to exhaust. And review of the Brief for Respondents in that case has confirmed that the Respondents did not promote such a claim. Brief For Respondents, *Harris v. Reed*, No. 87-5677, October Term, 1987.⁷

The *Hogan* court's reliance upon *Ylst* to support its position that it is unnecessary to seek review by the highest state court is similarly misplaced. The *Ylst* Court never addressed the question of whether the petitioner was required to exhaust his state court remedies by bringing them before the state's highest court. Nor would the *Ylst* Court have been called upon to decide that question, because the petitioner did in fact seek discretionary review before seeking the collateral relief which this Court deemed unnecessary. *Ylst*, 501 U.S. at 799. The question presented there was merely whether an unexplained order could serve to remove a procedural bar which would otherwise preclude *habeas* review on the merits. *Id.* at 802. Further, as shown above, a

⁷ O'Sullivan maintains that, for purposes of evaluating whether an individual has exhausted state court remedies, there is no legally significant difference between direct appeal and post-conviction appeal. The question of the necessity of seeking discretionary review from the state's highest court in the post-conviction context is pending before this Court in *Godinez v. White*, No. 98-477.

careful reading of *Coleman* is entirely inconsistent with the Court of Appeals' finding.

The Court of Appeals purported to draw support for its conclusion from the fact that Illinois discourages litigants from raising every possible claim of error on discretionary review which it determined substantiated its conclusion that Illinois does not consider it necessary that petitioners raise all of their claims in order to exhaust their remedies. JA 34, *Boerckel*, 135 F.3d at 1200. First, it is irrelevant whether Illinois considers it necessary that petitioners raise every possible claim of error in order to exhaust their remedies, because the exhaustion doctrine, rooted as it is in a federal statute, is of necessity a federal question. See *Jennison v. Goldsmith*, 940 F.2d 1308, 1310-1311 (9th Cir. 1991) (*per curiam*). Further, the fact that the Illinois Supreme Court encourages selective presentation of issues is consistent with the fact that federal *habeas corpus* is itself an extraordinary remedy. The district courts in the Seventh Circuit annually receive more than a thousand petitions for writs of *habeas corpus*, yet they grant only 1.5 percent of them. Don R. Sampen, *Defendant fails to preserve federal claim*, *Chicago Daily Law Bulletin*, June 3, 1997 at 6, col. 2.

Additionally, the Court of Appeals noted that Illinois recognizes that its Supreme Court practice is similar to this Court's *certiorari* procedure. *Id.* at 34-35 (citing Illinois Supreme Court Rule 315 Comm. Cmts). But there is an important distinction between requiring a prisoner to file a petition for writ of *certiorari* and requiring him to file a petition for leave to appeal for purposes of exhaustion. As has already been discussed,

exhaustion is rooted in concerns of federalism and comity. This means that the state courts should be given the first opportunity to examine and correct errors of federal constitutional concern which result from state court convictions. Requiring a prisoner to file for *certiorari* does not advance these interests. However, allowing the highest state court to review a state court conviction clearly does.

A "rigorously enforced total exhaustion rule" provides state courts with every possible opportunity to correct a constitutional error. *Rose*, 455 U.S. at 518-19. Strict enforcement of the exhaustion requirement furthers the purposes of exhaustion, and promotes the various state, federal, and prisoner interests involved, by providing state courts with ample opportunity to correct constitutional violations and by ensuring consolidation of prisoners' multiple claims. The Court of Appeals' holding here stands in stark contrast to these well-settled principles.

B. The Rule Proposed By O'Sullivan Would Be Consistent With This Court's Recent Precedents In Habeas Corpus Law.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court summarized briefly the four typical areas of inquiry in federal *habeas corpus* cases involving state court convictions, then acknowledged its "historic willingness to overturn or modify its earlier views of the scope of the writ" of *habeas corpus*. 433 U.S. at 77-81. Indeed, there is little question that this Court has overturned or modified its views on the scope of *habeas corpus* law in the past 20 to 25 years, and virtually each time that it

has done so, the rationale for doing so has been out of interests of federalism and comity. The Court's subsequent decisions have established procedural limits on federal *habeas corpus* review that have sought to balance the state's interest in the administration of criminal justice with the writ's fundamental purpose of curing constitutional error. These are the same concepts presented in this case. And, in this case, adoption of O'Sullivan's position requires no overturning or modification of the Court's caselaw.

In 1963, the Court issued a trilogy of cases which expanded the scope of federal *habeas corpus* review. As was stated in the first of these cases, *Fay v. Noia*, 372 U.S. 391, 411-412 (1963), the Court has not "always followed an unwavering line in its conclusions as to the availability of the Great Writ. Our development of the law of federal *habeas corpus* has been attended, seemingly with some backing and filling." *Fay* held that a state petitioner's failure to comply with a state procedural requirement, sufficient to preclude state court appellate review, would bar subsequent resort to the federal court only if the petitioner had deliberately bypassed state procedural requirements.⁸ The Court held that federal courts have the power to grant *habeas corpus* relief despite a petitioner's failure to exhaust a state court remedy no longer available when his *habeas corpus* petition is filed. *Fay*, 372 U.S. at 399.

⁸ *Fay* also overruled the holding of *Darr v. Burford*, 339 U.S. 200 (1950), that a state prisoner must ordinarily seek *certiorari* in the Supreme Court prior to applying for federal *habeas corpus* review. *Fay*, 372 U.S. at 435-38.

Townsend v. Sain, 372 U.S. 293 (1963), the second case of the 1963 trilogy, clarified the considerations that should govern the grant or denial of evidentiary hearings in federal *habeas corpus* proceedings. And in *Sanders v. United States*, 373 U.S. 1 (1963), the Court considered the standards by which a federal court should determine whether to grant a hearing on a second or successive motion of a federal prisoner under 28 U.S.C. § 2255.

Together, *Fay*, *Townsend*, and *Sanders* established broad standards for the exercise of federal *habeas corpus* review. See Mary Ann Snow, Comments, *Lundy Isaac and Frady: A Trilogy of Habeas Corpus Restraint*, 32 CATH. U. L. REV. 169, 203 (1982). Since those cases, however, this Court has markedly changed its direction.

In *Francis v. Henderson*, 425 U.S. 536 (1976), the Court acknowledged a federal court's power to entertain a *habeas corpus* petition even where the claim has been procedurally waived in state proceedings, but nonetheless examined the appropriateness of the exercise of that power and recognized, as it had in *Fay*, that considerations of comity and concerns for the orderly administration of criminal justice may in some circumstances, require a federal court to forego the exercise of its *habeas corpus* power. *Francis*, 425 U.S. at 538-539.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court firmly curtailed the broad availability of federal *habeas* review for state prisoners in cases of procedural default. The *Sykes* Court renounced the deliberate bypass waiver standard enunciated in *Fay v. Noia*, 372 U.S. 391 (1963), stating that the state rule deserved more

respect than the *Fay* standard accorded it. *Sykes*, 433 U.S. at 88. After *Sykes*, a *habeas* petitioner was required to demonstrate both cause and actual prejudice to excuse a failure to comply with an adequate state procedural requirement, which would otherwise operate to bar federal collateral review.

In *Engle v. Isaac*, 456 U.S. 107 (1982), the Court extended the *Sykes* cause and actual prejudice standard for excusing procedural defaults of state petitioners to claims of error that may have affected the determination of guilt at trial. In applying the cause and actual prejudice standard, the *Isaac* Court first ruled that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial," even if the state court has previously rejected that constitutional argument. *Id.* at 130. The Court explained:

If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.

Isaac, 456 U.S. at 130.

The Court likened the decision to withhold a known constitutional claim to the type of deliberate bypass condemned in *Fay*. *Isaac*, 456 U.S. at 130 n.36. Moreover, it stated that "[s]ince the cause-and-prejudice

standard is more demanding than *Fay*'s deliberate bypass requirement, we are confident that perceived futility alone cannot constitute cause." *Id.* (internal citation omitted). Thus, the application of the cause and prejudice requirement to constitutional claims that affect the truth finding function at trial was justified in *Isaac* to balance the *habeas* petitioner's interest in review of his constitutional claims against the state's interest in administering its criminal justice system without unwarranted federal court interference.

In *Teague v. Lane*, 489 U.S. 288 (1989) the Court stated:

We agree with Justice Harlan's description of the function of *habeas corpus*. "[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of a crime is afforded a trial free of constitutional error." *Kuhlmann v. Wilson*, 477 U.S. 436, 447, 106 S.Ct. 2616, 2623, 91 L.Ed. 2d 364 (1986) (plurality opinion). Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of *habeas* review. Thus, if a defendant fails to comply with state procedural rules and is barred from litigating a particular constitutional claim in state court, the claim can be considered on federal *habeas* only if the defendant shows cause for the default and actual prejudice resulting therefrom.

Id. at 308 (citing *Wainwright v. Sykes*, 433 U.S. at 87-91).

In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), the Court rejected *Fay*'s deliberate bypass standard in favor

of a cause and prejudice standard for excusing a *habeas* petitioner's failure to develop a material fact in state court proceedings. *Id.* at 5. The Court reasoned that it would be irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim. *Id.* at 7-8. Moreover, and more important to the issue presented here, the Court justified its holding in light of concerns of finality, comity, judicial economy and channeling the resolution of claims into the most appropriate forum. *Id.* at 8.

The decisions in *Francis*, *Sykes*, *Isaac*, *Teague*, and *Tamayo-Reyes* illustrate the Court's progression in applying the doctrines of federalism and comity to limit unjustified interference with state criminal convictions on federal *habeas corpus* review. Requiring an individual who is in custody pursuant to a state criminal conviction to raise all of his claims in a petition for discretionary review to the state's highest court before he may pursue claims in a federal *habeas* petition fosters these same concerns.

This Court intended the exhaustion doctrine to increase judicial efficiency. *Harris*, 489 U.S. at 255, 269 (O'Connor, J., concurring); *Rose*, 455 U.S. at 519 (noting that state courts create complete factual records that facilitate federal review). By requiring exhaustion of state remedies, federal courts encourage state courts to make, develop, and document factual and legal findings involved in prisoners' petitions. *Harris*, 489 U.S. at 269 (O'Connor, J., concurring) (citing *Rose*, 455 U.S. at 518-19). In addition, requiring exhaustion fosters an orderly process for *habeas* appeals forcing prisoners to pursue

all the remedies in one forum before pursuing remedies in another and by allowing prisoners to make only one transition between the two forums. Moreover, as prisoners work through the process, they may abandon *habeas* claims if state courts provide sufficient relief, or they may refine and clarify their *habeas* petitions through additional state court appeals, thereby reducing or eliminating the federal courts' duties. Judicial efficiency benefits state and federal courts as well as prisoners, who prefer to have their claims heard and resolved as quickly as possible. See *Rose*, 455 U.S. at 519-20.

In *Hogan*, the Court of Appeals expressed concern that, since defendants do not have a constitutional right to counsel on discretionary review, "treating an omission from a petition for a discretionary hearing as a conclusive bar to federal review under § 2254 could create a trap for unrepresented prisoners. . ." *Hogan*, 74 F.3d at 147. The Court of Appeals reiterated that concern in this case. JA 38, *Boerckel*, 135 F.3d at 1202. The Court of Appeals' concern is unnecessary. Since a defendant on appeal to the Illinois Appellate Court is entitled to counsel as of right, any relevant claims regarding trial court error are appropriately raised on that appeal. An unrepresented prisoner on discretionary review has the benefit of being able to raise those claims previously alleged on direct appeal where he had counsel. Moreover, a prisoner may not raise a claim for the first time on discretionary review. See *Castille v. Peoples*, 489 U.S. 346, 351 (1989). Thus, there is little risk that an unrepresented petitioner will be unable to present the perfected claims to the state's highest court.

Requiring a prisoner to apply for discretionary review from the state supreme court, the approach embraced by a majority of the federal circuit courts of appeals,⁹ insures that the states have the opportunity to participate in the development of federal and constitutional law. This majority approach also favors the federal courts' interest in judicial efficiency. These important concerns, upon which the doctrine of exhaustion is rooted, should encourage this Court to reject the Court of Appeals' approach and, instead, require exhaustion to the state's highest court on direct appeal.

⁹ See *McNeeley v. Arave*, 842 F.2d 230, 231 (9th Cir. 1988); *Jennison v. Goldsmith*, 940 F.2d 1308, 1310 (9th Cir. 1991) (*per curiam*); *Richardson v. Procunier*, 762 F.2d 429, 431-32 (5th Cir. 1985); *Dulin v. Cook*, 957 F.2d 758, 759 (10th Cir. 1992); *Grey v. Hoke*, 933 F.2d 117, 119 (2nd Cir. 1991); *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993); *Townsend v. Commissioner*, No. 94-1270, 1994 U.S. App. LEXIS 9750, at *2 (1st Cir. May, 1994) (unpublished opinion); *Caswell v. Ryan*, 953 F.2d 853, 861 (3rd Cir. 1992); but see *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984); *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994).

CONCLUSION

For the aforementioned reasons, Petitioner, William D. O'Sullivan, respectfully requests this Court to find that the United States Court of Appeals for the Seventh Circuit erred in holding that an individual who is in custody pursuant to a state criminal conviction may pursue claims in a federal *habeas* petition despite the fact that he failed to raise those claims on direct appeal in a petition for discretionary review to the state's highest court, and order the affirmance of the United States District Court's decision denying federal *habeas* relief.

Respectfully submitted,

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